

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRED H. EGGERS)	
Claimant)	
VS.)	
)	Docket Nos. 184,606 & 193,314
MID-CENTRAL/SYSCO FOOD SERVICES, INC.)	
Respondent)	
AND)	
)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed the May 30, 1996, Award entered by Administrative Law Judge Robert H. Foerschler in Docket No. 193,314. The Appeals Board heard oral arguments in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, David J. Bogdan of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Terri Z. Austenfeld of Overland Park, Kansas. There were no other appearances.

Docket No. 184,606

Neither of the parties requested review by the Appeals Board of the Award as it relates to Docket No. 184,606, date of accident June 2, 1992. Therefore, all findings, conclusions, and orders of the Administrative Law Judge contained in the Award dated May 30, 1996, that relate to Docket No. 184,606, date of accident June 2, 1992, remain in full force and effect.

Docket No. 193,314

RECORD AND STIPULATIONS

Although not listed by either of the parties as a specific issue, the contents of the record and the stipulation of the parties in regard to this docket number are in dispute. Therefore, the Appeals Board will discuss and determine the record and stipulations below.

ISSUES

The claimant requested Appeals Board review of the following issues:

- (1) The nature and extent of claimant's disability.
- (2) Whether claimant is entitled to future medical treatment upon proper application to and approval of the Director.

The respondent, at oral argument before the Appeals Board, requested Appeals Board review of the following issue:

- (3) The liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The initial problem in this case is that the Administrative Law Judge combined two separate injuries suffered by the claimant on two separate dates of accident into one Award. Claimant first filed an Application for Hearing on December 16, 1993, that alleged a date of accident of June 2, 1992, which alleged injuries to his left ankle, right hip, and low back. The Division of Workers Compensation assigned Docket No. 184,606 to that case. Subsequently, claimant filed an Application for Hearing on September 8, 1994, alleging a

date of accident of November 15, 1993, that allegedly caused injuries to claimant's low back. Docket No. 193,314 was assigned to that case and is the subject of this appeal.

The regular hearing was held in Docket No. 184,606 on November 21, 1995. At that regular hearing, the attorney for the claimant clarified that the regular hearing testimony would only be relevant to the June 2, 1992, accident. Following the regular hearing, the claimant took the deposition testimony of Nathan D. Shechter, M.D., on December 6, 1995, and his examination and testimony only related to the June 2, 1992, accident. Thereafter, the respondent took the deposition testimony of Charles Erik Nye, M.D., on January 22, 1996. The first 30 pages of Dr. Nye's deposition and Exhibit 1 entered into evidence at the deposition only related to the June 2, 1992, accident. The balance of Dr. Nye's deposition and Exhibit 2 only related to the November 15, 1993, accident. Respondent's attorney at lines 21-23 on page 30 of Dr. Nye's deposition clarified that he was starting to question Dr. Nye about the second injury that occurred in November of 1993 under Docket No. 193,314. The regular hearing in reference to Docket No. 193,314 with a date of accident of November 15, 1993, was held on February 13, 1996.

The Administrative Law Judge in Docket No. 184,606, in an Order dated February 24, 1994, appointed David A. Tillema, M.D., to perform an independent medical examination of the claimant and to render an opinion on claimant's permanent functional impairment as a result of claimant's June 2, 1992, work-related injury. Dr. Tillema's deposition testimony was not taken and only his report dated August 29, 1994, was entered into the record of evidence in Docket No. 184,606. The problem with Dr. Tillema's independent medical examination report was that he did not confine his examination and medical opinion to the June 2, 1992, injury but also expressed and combined his opinion on functional impairment with the November 15, 1993, injury.

Claimant filed a submission letter with the Administrative Law Judge dated March 4, 1996, in Docket No. 193,314. The submission letter listed the record as containing a regular hearing transcript held on February 13, 1996, and the deposition of Dr. Nye dated January 22, 1996, with a clarification that only 16 pages of the deposition testimony related to the November 15, 1993, injury. Respondent did not file a submission letter in this docket.

Claimant also filed a submission letter in Docket No. 184,606 on February 20, 1996, that listed the record for that docket number to include the regular hearing transcript dated November 21, 1995, Dr. Shechter's deposition dated December 6, 1995, Dr. Nye's deposition dated January 22, 1996, and Dr. Tillema's independent medical report dated August 29, 1994. The respondent also did not file a submission letter in that docket number. The Kansas Workers Compensation Fund did file a submission letter which confirmed that claimant's submission letter accurately set forth the contents of the record.

The Administrative Law Judge's Award is identified by both Docket No. 184,606 and Docket No. 193,314. The record listed by the Administrative Law Judge is identified as

consisting of the two regular hearings and the depositions identified above plus Dr. Tillema's IME report. The record was not separated according to accident date or docket number.

The Administrative Law Judge, in the Award, listed the stipulations of the parties which include both dates of accident. The average weekly wage was stipulated as \$380.71 and only relates to the date of accident of June 2, 1992. During the stipulations taken at the regular hearing in regard to Docket No. 193,314 on February 13, 1996, the parties stipulated that the claimant was eligible for the maximum temporary total disability rate of \$313. The amount of temporary total disability compensation paid was stipulated separately for each date of accident. The stipulated medical expenses paid only related to the June 2, 1992, accident.

The Administrative Law Judge awarded claimant permanent partial disability benefits of 25 percent for injuries he received in the accident dated June 2, 1992. The permanent disability award was based on a whole body functional impairment rating found by taking into consideration the separate rating opinions supplied by Dr. Shechter, Dr. Nye, and Dr. Tillema. Furthermore, the Administrative Law Judge found that considering Dr. Tillema's report and the other physicians' testimony, that claimant sustained no additional functional impairment as a result of the November 15, 1993, work-related accident. The Administrative Law Judge concluded, that since the claimant's second accident occurred after the July 1, 1993, amendments to the Workers Compensation Act, the claimant was not eligible for an award of permanent partial disability because the evidence in the record had failed to prove that the November 15, 1993, accident had caused any additional permanent functional impairment. See K.S.A. 44-501(c).

The claimant appealed and argues that the parties stipulated in the regular hearing transcript of February 13, 1996, in Docket No. 193,314 that claimant sustained a 5 percent whole body permanent functional impairment as a result of the low back injury suffered in the work-related accident of November 15, 1993. The 5 percent functional impairment rating was based on Dr. Nye's deposition testimony that concluded the claimant sustained a 5 percent permanent functional impairment in excess of his previous functional impairment that he suffered as a result of a back injury that occurred in 1980.

The Appeals Board has reviewed the stipulations of the parties taken by the Administrative Law Judge before claimant testified at the regular hearing held in Docket No. 193,314 on February 13, 1996. Claimant's attorney requested that Dr. Nye's 5 percent functional impairment rating be stipulated to because it was the only rating in the record for the November 15, 1993, accident. Following that request, after conversation concerning other issues, respondent's attorney in return asked the claimant's attorney if he would stipulate to Dr. Nye's 5 percent functional impairment rating. Claimant's attorney, who had previously asked for such a stipulation, agreed. The Administrative Law Judge then clarified that the 5 percent functional impairment rating stipulation was understood to be in addition to the claimant's prior disability. The Administrative Law Judge further stated

that the remaining issues were Fund liability, future medical, and nature and extent of disability based upon the agreement that there was a 5 percent additional functional impairment resulting from the low-back injury that claimant received in the November 15, 1993, accident.

Respondent, on the other hand, argues that the stipulations before the regular hearing held in Docket No. 193,314 on February 13, 1996, were not clear. Therefore, the respondent contends that the Administrative Law Judge did not abuse his discretion when he considered the evidence presented in both docket numbers in finding that there was no evidence that claimant's work-related accident of November 15, 1993, caused any additional permanent disability to claimant's low back.

First, the Appeals Board finds that the record of evidence that should be considered when deciding Docket No. 193,314 should consist only of the regular hearing transcript dated February 13, 1996, and the testimony of Dr. Nye starting at the bottom of page 30 of his deposition plus Exhibit 2, Dr. Nye's medical records concerning the care and treatment of the claimant for the November 15, 1993, injury. Second, the claimant's attorney specified this record in the regular hearing transcript. Third, respondent's attorney limited the last portion of Dr. Nye's deposition only to injuries claimant received in the November 1993 accident. Finally, claimant's submission letter stated the record to be considered for the determination of workers compensation benefits due the claimant for the November 15, 1993, accident with no objection by respondent or Fund.

The Appeals Board finds, that when this record of evidence is considered in determining the nature and extent of claimant's disability for the November 15, 1993, accident, it is clear from the stipulations contained in the regular hearing transcript dated February 13, 1996, that the parties agreed that as a result of the November 15, 1993, accident, claimant suffered a 5 percent permanent functional impairment in excess to his preexisting low-back functional impairment. The Appeals Board therefore concludes claimant is entitled to permanent partial disability benefits of 5 percent for the November 15, 1993, accidental injury.

Furthermore, the Appeals Board finds that Dr. Nye's testimony established that the November 15, 1993, accident caused an increase in claimant's preexisting functional impairment by 5 percent. This opinion is uncontradicted. Accordingly, even without the 5 percent stipulation, the evidence proves claimant is entitled to permanent partial disability benefits of 5 percent.

(2) The Appeals Board finds claimant is also entitled to future medical treatment upon application and approval of the Director.

The respondent has the responsibility to provide claimant with medical treatment as may be reasonably necessary to cure and relieve the claimant from the effects of the injury. See K.S.A. 44-510(a). Therefore, an order entitling claimant to future medical

treatment only upon application and approval of the Director is appropriate because the respondent has the right to be heard on the question of necessity and reasonableness of the requested medical treatment. See Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. ____ (1996).

(3) Respondent argues the Award and all costs are the liability of the Fund, if the Appeals Board finds that the claimant was entitled to permanent partial disability benefits as a result of the November 15, 1993, injury. The respondent points to Dr. Nye's testimony that established claimant would not have sustained any additional permanent impairment as a result of the November 15, 1993, accident but for the 1980 low back injury and subsequent lumbar laminectomy surgery. Respondent argues that claimant's previous permanent functional impairment of the low back constituted a handicap in claimant obtaining and retaining employment. Therefore, respondent contends that it has satisfied its burden of establishing Fund liability as contained in K.S.A. 44-567(a).

The Appeals Board disagrees with respondent. The Appeals Board finds that the record of evidence as designated above in regard to the November 15, 1993, injury, does not contain proof that the respondent had knowledge that claimant had a preexisting permanent impairment that constituted a handicap. See K.S.A. 44-567(b). The Appeals Board concludes that there is no evidence in the record that claimant was permanently restricted from any activities following his 1980 low-back surgery. In fact, even following claimant's low-back injury of November 15, 1993, Dr. Nye released claimant to return to regular work without permanent restrictions. The Appeals Board, therefore, finds the Fund has no liability in regard to claimant's November 15, 1993, injury and resulting disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated May 30, 1996, in Docket No. 193,314, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Fred H. Eggers, and against the respondent, Mid-Central/Sysco Food Services, Inc., and its insurance carrier, Wausau Insurance Companies, for an accidental injury sustained on November 15, 1993, and based upon the stipulation of the parties that claimant was eligible for the maximum compensation rate of \$313.

Claimant is entitled to 5 weeks of temporary total disability compensation at the rate of \$313 per week or \$1,565 followed by 20.75 weeks of permanent partial general disability benefits at the rate of \$313 per week or \$6,494.75 for a 5% permanent partial disability, making a total award of \$8,059.75.

As of September 20, 1997, all of the award in the amount of \$8,059.75 is due and owing and is ordered paid in one lump sum less any amounts previously paid.

Future medical treatment is awarded claimant upon proper application and hearing before the Director.

The respondent is liable for payment of all benefits awarded and the Kansas Workers Compensation Fund is to found to have no liability for the Award as it relates to Docket No. 193,314.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
David J. Bogdan, Overland Park, KS
Terri Z. Austenfeld, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director